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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BOBBY N. OWENS,

Petitioner,

VS.

TEXACO, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Where a Title VII plaintiff establishes a prima facie case of intentional discrimination, may the trier of fact reject a defendant's proffered explanation of its actions solely because the trier of fact finds that explanation unworthy of belief?

PARTIES

The petitioner in this Court is Bobby N. Owens. The respondent is Texaco, Inc. The original complaint in this proceeding also named as defendants the International Association of Machinists and Local 1792 of that union; the district court dismissed the claims against the union defendant, and petitioner did not appeal that dismissal.

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v.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner, Bobby N. Owens, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit entered in this proceeding on October 14, 1988.

OPINIONS BELOW

The decision of the Fifth Circuit is reported at 857 F.2d 262 (5th Cir. 1988), and is set forth at pp. 24a-41a of the

Appendix. The order of the Fifth Circuit denying rehearing and rehearing en banc, which is not yet reported, is set out at pp. 42a-44a of the Appendix. The district court's Findings of Fact and Conclusions of Law, which are not reported, are set out at pp. 1a-23a of the Appendix.

JURISDICTION

The original decision of the Fifth Circuit was entered on October 14, 1988. A timely petition for rehearing was denied on December 6, 1988. Jurisdiction of this Court is invoked under 28 U.S.C.§ 1254(1).

STATUTORY PROVISION AND RULE INVOLVED

Section 703(a)(1) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e-2(a), provides in pertinent part:

> It shall be an unlawful practice for an employer ... to discharge any individual ... because of such individual's race.

Rule 52(2), Federal Rules of Civil Procedure, provides in pertinent part:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

STATEMENT OF THE CASE

Petitioner, a black male, was hired by Texaco in August 1977. In 1980 petitioner entered a craft training program for carpenters; petitioner completed that program within 30 months, and was promoted to carpenter. In early 1983 Texaco announced its intention to lay off a limited number of workers. Over the objection of the International Association of Machinists, which represented the carpenters, Texaco laid off petitioner, and retained in his stead a white carpenter who had been hired in 1981.

As of 1983 the seniority rule governing layoffs was to some degree a matter of contention between Texaco and IAM. For many years prior to 1980 it was Texaco's practice to calculate the seniority of a craftsman from the date on which he entered the craft training program. In 1980, the year in which Owens entered the carpenter training program, Texaco insisted that the use of entry date seniority be restricted to craftsmen who completed the training program within 30 months; craftsmen who required longer to complete the program, Texaco proposed, would be given a seniority date based on the day they completed the training program. In discussions in 1980 the IAM objected to Texaco's proposed alteration of the practice, and for several years the matter remained unresolved. When layoffs were proposed in 1983, Owens had

successfully completed the training program in less than 30 months. The IAM offered to accept Texaco's unresolved 1980 proposed version of the seniority rule, a proposal which would have protected Owens from layoff. Texaco, however, disavowed its longstanding seniority position, calculated Owens seniority on the basis of the date on which he had completed the program, and laid him off.

After filing charges with the EEOC, Owens commenced this action under Title VII in the United States District Court for the Eastern District of Texas. The case was tried in 1984 by Judge Joe J. Fisher, sitting without a jury. On July 1, 1985, Judge Fisher issued findings of fact and conclusions of law, holding that Texaco was racially motivated when it disavowed its own proposed seniority rule, and laid off Owens rather than a more

recently hired white carpenter.[1] The district judge emphasized that petitioner was the only black in the training program at issue (10a, 13a), and that he was the only employee adversely affected by Texaco's refusal to implement the very seniority rule which the company had advocated since 1980. (13a). The district judge found that Texaco officials had inaccurately assured petitioner that he would indeed receive entry date seniority (10a, 11a). The record also revealed that in late 1982, before any layoffs were proposed, Texaco itself had issued a seniority list stating that Owens' classification seniority date was "8/18/80," the day he had entered the craft training program. (PX 34, p. 8).

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[1] The original complaint named as defendants both the IAM and its local. The district court dismissed the claims against those defendants, and petitioner did not appeal that dismissal. (3a).

The district court held that petitioner had established a prima facie case of intentional racial discrimination. (19a-20a). Texaco attempted to rebut that prima facie case by offering testimony that it decided to lay off petitioner, rather than the more recently hired white, on the advice of counsel. The attorney who allegedly gave that advice was called as a witness, and was questioned by the trial judge himself. The judge expressed from the bench doubts about the credibility of the attorney at issue, and subsequently held that Texaco's purported explanation was "a mere pretext to cover up their discriminatory actions against plaintiff because of his race."(21a-22a).

The Fifth Circuit read the district court's opinion to hold that, even in the absence of a more specific agreement between Texaco and IAM on the issue, the

general terms of the collective bargaining agreement required that entry date seniority be used to calculate the seniority date of carpenters. (31a-36a). The appellate court held that this was an error of law, since the interpretation of that collective bargaining agreement was the sole province of the arbitrator to whom that very question had been referred, and who had interpreted the contract to call for completion date seniority in the absence of a separate agreement to the contrary. (Id.) Rather than remand the case for further proceedings consistent with its own view of the law, however, the Fifth Circuit proceeded to decide the case itself, holding that Texaco was not racially motivated when it refused to adhere to its own proposal to accord entry date seniority to any person who had

completed his craft training within 30 months. (36a-38a).

Petitioner sought rehearing in the court of appeals, expressly requesting that Judge Fisher be accorded an opportunity to reassess the evidence in light of the error of law that had been identified by the panel decision. Petitioner urged that such a remand was required by Pullman Standard v. Swint, 456 U.S. 273, 291 (1982).[2] Petitioner also requested that rehearing or rehearing en banc be granted to address with greater care the pivotal question raised by the action of the original panel -- whether under Title VII Judge Fisher could reject Texaco's explanation of its actions because he found the critical defense

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[2] Petition for Rehearing by Plaintiff-Appellee (5th Cir. No. 86-2551), pp. 3-4.

testimony unworthy of belief.[3] Rehearing and rehearing en banc were denied without opinion (42a-47a).

REASONS FOR GRANTING THE WRIT

This case presents the recurring issue which this Court considered but did not resolve in Harbison-Walker v. Brieck (No. 87-271) -- whether a trier of fact may reject a Title VII defendant's proffered explanation of its actions

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[3] Id. at 3 ("The panel decision in this case presents the question of whether in an Title VII case in which the plaintiff has made out a prima facie case, the trier of fact can reject the employer's explanation as unworthy of credence"); Suggestion for Rehearing En Banc, p. iii (the question on which rehearing en banc was sought was "In a Title VII case in which the plaintiff establishes a prima facie case of discrimination, may the trier of fact reject the employer's explanation because it finds that explanation unworthy of credence?"). In our brief before the original panel we also emphasized that Judge Fisher's finding of pretext had been based on his evaluation of the demeanor and credibility of the relevant company witnesses. Brief of Appellee Bobby N. Owens, pp. 22-23.

simply because the trier of fact finds that explanation unworthy of belief. That question was extensively briefed in Harbison-Walker, and was the central issue at the oral argument in that case. Harbison-Walker was ultimately dismissed on the ground that certiorari had been improvidently granted, 102 L.Ed.2d 512 (1988), apparently because the record in the case did not in fact present the issue posed by the petition. The underlying problem considered in Harbison-Walker, however, remains of ongoing importance.

The Fifth Circuit panel in the instant case followed the practice advocated by the employer in Harbison-Walker, simply accepting as truthful defense testimony which the trial judge evidently did not believe. (36a-39a). A number of other circuit court opinions proceed in this manner. E.g. Menard v.

First Sec. Services Corp., 848 F.2d 281, 287-88 (1st Cir. 1988). Several circuits, on the other hand, insist that the appellate courts cannot rely on an employer's explanation which was, or might have been, disbelieved by the trier of fact. The Third Circuit has repeatedly held that a trier of fact can reject an employer's proffered explanation simply because it does not believe the pivotal defense testimony. In Bhaya v. Westinghouse Elec. Corp., 832 F.2d 258 (3d Cir. 1987), the court of appeals reinstated for this reason a jury finding of discrimination that had been overturned by the district court:

> The district court apparently thought that the defendant dispelled any inference of discrimination merely by introducing testimony of a legitimate reason for its actions. Evaluation of witness credibility is the exclusive function of the jury, and where the only evidence of intent is

> oral testimony, a jury could always choose to discredit it.

832 F.2d at 262 (emphasis added). The District of Columbia Circuit adheres to the same rule:

> The Company now appears to argue that its mere articulation of any putatively business rationale requires the court to take the case from the jury. We reject that argument.... [The] employer's ... alleged justifications for the disparate treatment was presented through the testimony of past or current employees, officers, or owners.... The weight to be given to these offered business justifications thus required an evaluation of witness credibility... [A] jury could always choose to discredit the proffered explanation.... "The jury, whose province it was, could disbelieve the ... supervisors' testimonial explanation."

Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1234-35 (D.C. Cir. 1984); but see id. at 1239-47 (Scalia, J., dissenting). Similarly, in Rosenfield v. Wellington Leisure Products, Inc., 827 F.2d 1493

(11th Cir. 1987), the Eleventh Circuit reinstated a disputed jury verdict because "[a]ssessing the credibility of witnesses is a task generally reserved for the finder of fact." 829 F.2d at 1497. Decisions in the Second and Seventh Circuits[4] uphold findings of discrimination because the trier of fact

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[4] Reed-Baker v. Lincoln Nat. Corp., 834 F.2d 1373, 1378 (7th Cir. 1987) ("Here Judge Lee found that Lincoln's management lied about its real reasons for personnel actions against Baker.... Judge Lee did not believe Lincoln's witnesses when they asserted these business reasons.") (emphasis in original); Schmitz v. St. Regis Paper Co., 811 F.2d 131, 132 (2d Cir. 1987) ("St. Regis evidently does not understand the effect that [defense witness] Thaden's testimony and demeanor on the witness stand had on Judge Broderick, the trier of fact. The Judge could fairly conclude from Thaden's testimony and demeanor that he harbored a discriminatory attitude toward Schmidt.... Judge Broderick evidently did not believe Thaden's testimony ... Judge Broderick's conclusion therefore rested on his credibility determination. Having observed Thaden testify in court, Judge Broderick was in a better position to assess Thaden's credibility than this Court is on appeal.")

had concluded that the critical defense witnesses were lieing.

There is disagreement about the general significance of credibility determination in Title VII cases. The decision in the instant case, which simply ignored the district court's possible evaluation of the credibility of respondent's witnesses, is not atypical. The Second Circuit has gone so far as to express doubts about the propriety of relying in Title VII cases on determinations as to the credibility of the plaintiff's witnesses.[5] On the other hand, the Seventh,[6] Eighth[7] and Eleventh[8]

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[5] Woodbury v. New York City Transit Authority, 832 F.2d 764, 771 (2d Cir. 1987) (trial court's reliance on "the 'sincere impressions' of plaintiffs' witnesses constitute[d] a ... dubious basis for the district court's finding of discrimination").

[6] Mathewson v. National Automatic Tool Co., 807 F.2d 87, 90 (7th Cir. 1986) ("in an employment discrimination case ...

circuits treat credibility determinations as critical in Title VII disparate treatment cases. The Sixth Circuit attaches particular importance to the testimony and cross-examination of the specific supervisory official who

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the result frequently turns on sensitive and difficult factual questions involving motive, thus often making the credibility of witnesses decisive."); Yarbrough v. Tower Oldsmobile, Inc., 789 F.2d 508, 513 (7th Cir. 1986); Christie v. Foremost Ins. Co. 785 F.2d 584, 586 (7th Cir. 1988).

[7] MacDissi v. Valmont Industries, Inc., 856 F.2d 1054, 1059 (8th Cir. 1988) ("we defer to the judgment of the District Court, particularly where its understanding of [the employer's] defense is enhanced (as ours is not) by its observation of [the employer's] witnesses on the stand."); Weber v. Block, 784 F.2d 313, 316 and n. 5 (8th Cir. 1988)).

[8] Castle v. Sangamo Weston, Inc., 837 F.2d 1550, 1559 (11th Cir. 1988) ("The jury found Sangamo Weston's explanations unworthy of credence. Assessing the ... credibility of witnesses is reserved for the trier of fact.")

personally made the disputed personnel decision.[9]

There is also a widespread disagreement about whether a plaintiff must offer additional evidence if his or her prima facie case has been rebutted by the employer's articulation of a non-discriminatory reason for its actions. The Ninth[10] and Eleventh Circuits[11] hold

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9 Burton v. State of Ohio, Adult Parole Authority, 798 F.2d 164, 167 (6th Cir. 1986).

10 Brown v. Sierra Nevada Memorial Miners Hosp., 849 F.2d 1186, 1192 (9th Cir. 1988) ("It is obvious that a strong prima facie case cannot be neutralized by weak evidence of a legitimate reason for the challenged action."); cf. Lowe v. City of Monrovia, 775 F.2d 998, 1008 (9th Cir. 1985).

11 Grigsby v. Reynolds Metals Co., 821 F.2d 590, 595-96 (11th Cir. 1987) ("the inference of intentional discrimination raised by a plaintiff's prima facie case may be stronger or weaker, depending upon the facts of the particular case.... In some cases, the defendant's evidence of a legitimate non-discriminatory reason for its actions may be so strong as to rebut completely the

that the prima facie case, at least if it is a strong one, may be sufficient to overcome the weight of that rebuttal evidence. On the other hand, the First[12] Circuit holds that the prima facie case is completely dissipated by the introduction of that explanation. The First,[13]

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inference raised by the plaintiff's prima facie case.") (emphasis added).

[12] Menard v. First Sec. Services Corp., 848 F.2d 281, 287 (1st Cir. 1988) ("the inference of discrimination created by the prima facie case is dispelled once the employer's reason is stated"); Dea v. Look, 810 F.2d 12, 15-16 (1st Cir. 1987) ("the inference of discrimination created by the prima facie case is dispelled once the employer's reason is stated").

[13] Menzel v. Western Auto Supply Co., 848 F.2d 327, 329 (1st Cir. 1988) ("Plaintiff must disprove the defendant's reasons.... The employer provided specific, non-discriminatory reasons for the dismissal ... Menzel had to address those reasons....") (emphasis in original); Gray v. New England Tel. and Tel. Co., 792 F.2d 251, 255-56 (1st Cir. 1986); Dance v. Ripley, 776 F.2d 370, 374 (1st Cir. 1985).

Seventh[14] and Tenth[15] Circuits insist that, when such an explanation has been offered, the plaintiff must adduce evidence specifically attacking each of the proffered reasons. But the Sixth,[16] Eighth[17] and Eleventh[18] Circuits have

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14 Dale v. Chicago Tribune Co., 797 F.2d 458, 464 (7th Cir. 1986) ("in order to rebut the Tribune's proffered explanation, Dale must refute the Tribune's specific explanations"); Dorsch v. L. B. Foster Co., 782 F.2d 1421 (7th Cir. 1986).

15 Carey v. U. S. Postal Service, 812 F.2d 621 (10th Cir. 1987).

16 Goosetree v. State of Tennessee, 796 F.2d 854, 861 (6th Cir. 1986) ("It is clear that the plaintiff need not introduce new evidence regarding pretext"); Ridenour v. Lawson Co., 791 F.2d 52, 56 (6th Cir. 1986).

17 Washburn v. Kansas City Life Ins. Co., 831 F.2d 1404, 1408 (8th Cir. 1987) ("the district court concluded that Washburn did not meet his ultimate burden of showing that his age was a determining factor in his discharge, because he had failed to provide sufficient rebuttal evidence after defendant's showing of nondiscriminatory reasons for his discharge.... Washburn was not necessarily required to present

expressly rejected that requirement, holding that a plaintiff may rely simply on the probative force of the evidence adduced to establish his or her prima facie case.

Underlying these disputes is a more far reaching disagreement about what inference, if any, should be drawn if the trier of fact --based on credibility or other evidence -- concludes that an employer's proffered explanation of its conduct is untrue. The Third, Sixth and Eighth Circuits hold that the proffer of an inaccurate explanation is itself

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additional rebuttal testimony following K.C. Life's showing of nondiscriminatory reasons for Washburn's termination") (emphasis in original); O'Connor v. Peru State College, 781 F.2d 632, 637 (8th Cir. 1986).

[18] Dannellon v. Fruehauf Corp., 794 F.2d 598, 601 (11th Cir. 1986) (rejecting contention that plaintiff was required to adduce "new evidence after the defendant articulated its reasons for her discharge.")

substantial evidence of intentional discrimination.[19] The District of Columbia Circuit goes even further, holding that evidence successfully discrediting a proffered explanation

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[19] MacDissi v. Valmont Industries, Inc., 856 F.2d 1054, 1059 (8th Cir. 1988) ("As a matter of both commonsense and federal law, an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred"); Roebuck v. Drexel University, 852 F.2d 715, 734 n.32 (3rd Cir. 1988) ("falsity or incorrectness of one" proffered explanation permits an inference that all the employer's explanations are pretextual); In re Lewis, 845 F.2d 624, 633 (6th Cir. 1988) ("The more questionable the employer's reason, the easier it will be for the jury to expose it as pretext"); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 899 (3rd Cir. 1987) ("If the plaintiff convinces the trier of fact that it is more likely than not that the employer did not act for its proffered reason, then the employer's decision remains unexplained and the inferences from the evidence produced by the plaintiff may be sufficient to prove the ultimate fact of discriminatory intent....")

mandates a finding of discrimination.[20] But the First[21] and Fifth[22] Circuits hold

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[20] King v. Palmer, 778 F.2d 878, 880-81 (D.C. Cir. 1985) ("Having determined that [plaintiff] King had discredited the defendants' explanation, the trial court was required to grant judgment in her favor. In other words, Ms. King should have prevailed because the defendants never rebutted the 'presumption that the employer unlawfully discriminated'").

[21] Menard v. First Sec. Services Corp., 848 F.2d 281, 287 (1st Cir. 1988) ("a claimant 'cannot meet his burden of proving "pretext" by refuting ... the defendants' articulated reason'"); Dea v. Look, 810 F.2d 12, 15 (1st Cir. 1987) (same); White v. Vathally, 732 F.2d 1037, 1042 (1st Cir. 1984) (a showing of pretext "does not relieve the plaintiff of the burden of persuasion on the ultimate issue of discrimination"); Gray v. New England Tel. and Tel. Co., 792 F.2d 251, 255 (1st Cir. 1986) ("evidence contesting the factual underpinnings of the reasons proffered by [the employer] ... are insufficient ... to present a jury question").

[22] Bienkowski v. American Airlines, Inc., 851 F.2d 1503, 1507-08 (5th Cir. 1988) (verdict for plaintiff could not be justified merely by evidence that the employer's "reasons for firing him are not justified or supported by objective facts"; finding that employer's account of the facts was incorrect "would not lead

that a plaintiff cannot establish pretext merely by showing that the proffered explanation was inaccurate; these circuits reason that it is possible defense witnesses may lie merely to cover up a purpose other than illicit discrimination.[23] In the First and Fifth Circuits a

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to a conclusion that the employer's version is a pretext for ... discrimination.")

[23] The clearest exposition of this view is in Judge Hunter's dissenting opinion in Chipollini:

> "An employer's proffered reason for terminating an employee may be pretextual without violating the ADEA or any other civil rights statute. An employer motivated by ill-will, nepotism, or unpublicized financial problems ... is just as likely to use a pretextual explanation for his action as is an employer motivated by statutorily-prohibited discrimination.... By allowing the plaintiff to withstand defendant's motion for summary judgment merely, by showing pretext, the majority opens the door for ... recovery ... based on any of the non-discriminatory reasons enumerated above."

prima facie case can apparently be decisively rebutted with false, even perjurious testimony. In that context, it is understandable that the panel in the instant case might have regarded as irrelevant the possibility that the district judge had concluded that the pivotal defense witness was not telling the truth. The Seventh Circuit takes an intermediate position, holding that defense evidence proffering an inaccurate explanation, although constituting proof of discrimination, is nonetheless sufficient to rebut a plaintiff's prima facie case of discrimination.[24] The Fifth

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814 F.2d at 903 (emphasis added).

[24] Benzies v. Illinois Dept. of Mental Health, 810 F.2d 146, 148 (7th Cir. 1987); cf. Johnson v. University of Wisconsin-Milwaukee, 783 F.2d 59, 64 (7th Cir. 1986) ("plaintiff must show that defendant's proffered reason is not just a pretext, but a pretext for discrimination").

Circuit expressly disapproves of the rule in the Third Circuit.[25] In one of the Third Circuit cases, a dissenting opinion relied on the contrary First Circuit rule.[26] One of the earlier First Circuit cases relies on the district court opinion later overturned in the Third Circuit.[27]

The procedural posture of the instant case is the same as that of Pullman Standard v. Swint, 456 U.S. 273 (1982). The district court here found that Texaco

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25 Bienkowski, 851 F.2d at 1508 n.6 ("The Third Circuit has held ... that if a plaintiff's proof consists of only a refutation of the employer's legitimate nondiscriminatory reason ... plaintiff may obtain a favorable verdict of discrimination. Chipollini v. Spencer Gifts, 814 F.2d 893 (3rd Cir. 1987).... We disagree with this view.")

26 Chipollini v. Spencer Gifts, 814 F.2d at 903 (dissenting opinion) (citing White).

27 Gray v.New England Tel. and Tel. Co., 792 F.2d at 255, citing Chipollini v. Spencer Gifts, 613 F. Supp. 1156 (D.N. J. 1985), rev'd 814 F.2d 893 (3rd Cir. 1987).

was guilty of intentional racial discrimination in laying off petitioner, a black carpenter, rather than a more recently hired white carpenter. The Fifth Circuit ruled that the trial court's finding was tainted by an error of law, because the district court had failed to treat as binding on it an arbitrator's construction of the relevant collective bargaining agreement (31a-36a). In that circumstance, Swint ordinarily requires that a case be remanded to the district court for additional findings of fact.

> When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings.... "[F]act finding is the basic responsibility of district courts, rather than appellate courts...."

456 U.S. at 291. Rather than remanding the case as required by Swint, however, the fifth circuit made its own evaluation

of the evidence, and found that there had been no intentional discrimination.

The district court in the instant case held that petitioner had established a prima facie case of discrimination (19a-20a). Texaco responded by offering testimony adducing a non-racial explanation for its actions; its witnesses asserted that Texaco had rejected a seniority rule that would have protected petitioner from dismissal -- a rule which the company itself had repeatedly proposed -- because of concern that the company might be sued by the more recently hired white carpenter. (21a)[28] The district judge who heard that testimony, particularly the testimony of the Texaco attorney who allegedly warned that the

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[28] There is a dispute regarding which company officials were aware of the race of the two individuals affected by this decision.

company be sued for adopting its own proposed seniority rule, rejected it as a "pretext." (21a) See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255-56 (1981).

This is clearly a case in which the district court's decision turned on the trial judge's doubts about the credibility of the company attorney called as a witness by Texaco. That defense witness initially testified that he advised against adhering to Texaco's own seniority proposal solely because layoffs had already been announced;[29] after lengthy cross-examination by Judge Fisher, however, the attorney changed his story, and asserted that the imminent layoffs were not a factor in his decision.[30] Judge Fisher's comments from the bench

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29 Tr., v. 2, p. 233.

30 Tr., v. 2, p. 253.

during this testimony made clear the judge's considerable reservations about its credibility:

> Now do you not find that a little inconsistent?[31]
>
> Well, we will take what you say, but the Court hears what you said but we don't necessarily believe that those are the correct facts.[32]
>
> The Court has a hard time following that reasoning....[33]
>
> [The attorney's purported advice] is a very thin reason and a very thin justification and the fact is that it just will not hold water.[34]

It is evident that Judge Fisher simply did not believe the testimony offered by Texaco to rebut petitioner's prima facie case; at the least, under Swint, the trial judge should have been accorded an

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31 Id. v. 2, p. 243.

32 Id., v. 2, p. 247.

33 Id., v. 2, p. 251.

34 Id. v. 2, p. 294.

opportunity to reevaluate his view of the testimony in light of the Fifth Circuit's legal holding concerning the construction of the relevant collective bargaining agreement.

The Fifth Circuit, however, refused to remand the case because the appellate court credited the critical disputed testimony concerning Texaco's refusal to adhere to its own seniority proposal:

> When the IAM approached Texaco in 1983 and offered to agree to Texaco's request to limit training course seniority to those completed in 30 months, Texaco consulted its house counsel, Sheil. Sheil advised Texaco that although the company had the right to agree to the proposal at that juncture, he recommended against it. In his opinion, changing the seniority list after a layoff had been announced would create a greater risk of ultimate liability than not changing it.... Texaco relied on Sheil's advice ... Sheil's advice was sound, but even if it had not been so, there is no evidence that Texaco's reliance on it was

> unreasonable or merely a pretext to cover a racial motive.

(36a-39a). This critical position of the Fifth Circuit opinion simply parrots, and accepts without question, the very testimony which the trial court evidently did not believe. It is unclear whether the panel members personally credited the testimony of Texaco's witnesses, or whether they felt the courts were legally obligated to accept such testimony as truthful, even if they thought otherwise, unless the testimony was directly contradicted by evidence other than the original prima facie case of discrimination.

The resolution of this case turns on the very question briefed and argued but not resolved in Harbison-Walker. If in a Title VII case a judge can reject a defendant's rebuttal explanation because the judge finds the defense testimony

unbelievable, then the decision of the Fifth Circuit was error. In this case the possibility that the trier of fact might find such testimony incredible is not merely theoretical; the record makes clear that Judge Fisher had severe doubts about the veracity of the key testimony. Conversely, if Judge Fisher would under Burdine be legally compelled to accept that testimony as truthful -- even though the demeanor of the relevant witnesses, and other circumstances, convinced him they were lying -- then there was no need to remand this case for additional findings of fact.

The Fifth Circuit decision in the instant case is clearly inconsistent with this Court's decision in Burdine. Burdine squarely holds that, if a discrimination case goes to trial, the trier of fact may indeed reject the defendant's explanation

as pretextual solely on the basis of the prima facie case and the lack of credibility of the witness offering the employer's justification.

> [P]laintiff's initial evidence ... and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant will suffice to discredit the defendant's explanation.

450 U.S. at 255 n. 10. Burdine stressed that a plaintiff may prevail, inter alia, "by showing that the employer's proffered explanation is unworthy of credence." 450 U.S. at 256.[35]

The Fifth Circuit, although not denying that petitioner had established a

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[35] Cf. U.S. Postal Service Bd. of Govs. v. Aikens, 460 U.S. 711, 714 n. 3 (1983) (trier of fact to decide regarding testimony "whatever weight and credence it deserves.")

prima facie case of discrimination, asserted that there was "no evidence" that Texaco's explanation was pretextual (39a); the court of appeals evidently assumed that the evidence relied on to establish the prima facie case could not also be relied on to discredit Texaco's non-racial defense of its actions. This failure to consider the prima facie case itself as evidence of pretext was squarely inconsistent with the Federal Rules of Evidence. The Advisory Committee note to Rule 301 states in part:

> The so-called 'bursting bubble' theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions "to slight and evanescent" an effect.[36]

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[36] Federal Civil Judicial Procedure and Rules, 274 (1987 ed.) (emphasis added).

Where, as here, a plaintiff adduces evidence establishing a prima facie case, and thus a presumption of discrimination, the decisionsof this Court do not permit a defendant to rebut that presumption with testimony which the trier of fact, based on demeanor evidence and any other relevant circumstances, concluded was untruthful.

CONCLUSION

For the above reasons, a writ of certiorari should be granted to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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March, 1989

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

BOBBY N. OWENS	*	
	*	
VS.	*	
	*	CIVIL
TEXACO INC., AND THE	*	ACTION
INTERNATIONAL ASSOCIATION	*	No. B-83-
OF MACHINISTS AND AEROSPACE	*	1067-CA
WORKERS, AND THE INTERNATIONAL	*	
ASSOCIATION OF MACHINISTS AND	*	
AEROSPACE WORKERS, LOCAL 1792	*	

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Attorney for Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-captioned cause came on for trial before the Court on January 24, 1985, and the Court having considered the pleadings, the evidence, the arguments of

counsel and having been fully advised of the premises, now makes and files its Findings of Fact and Conclusion of Law in accordance with Rule 52 of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

I.

This is an action by Bobby N. Owens against his former employer, Texaco, Inc., and against his former collective bargaining representative, the International Association of Machinists and Aerospace Workers and the International Association of Machinists and Aerospace Workers, Local No. 1792, alleging discrimination because of his race in violation of Title VII of the Civil Rights Act of 1964, and of 42 U.S.C. § 1981. The Plaintiff alleges that he was denied classification seniority as a carpenter because of his race and as a

result of the denial of his seniority, was laid off. The Court has previously dismissed all claims against the Unions.

II.

Plaintiff, Bobby N. Owens, is a black citizen of the United States residing in the City of Beaumont, in the State of Texas.

III.

Defendant Texaco is, at all times relevant to this action, a corporation doing business in Port Neches, Texas. Defendant Texaco is an employer within the meaning of Title VII.

IV.

Defendant International Association of Machinists and Aerospace Workers and International Association of Machinists and Aerospace Workers Local 1792, hereinafter "Local 1792," are labor

organizations subject to the provisions of Title VII.

V.

Plaintiff was originally employed by Jefferson Chemical Company, a subsidiary of Texaco, Inc., in the Operating Department of its Port Neches Chemical Plant on August 31, 1977, and, along with other new employees, was placed in the janitor classification for training in company operations. On September, 16, 1977, Plaintiff became a controlman on an operating unit. Controlmen were represented for collective bargaining purposes by the Oil, Chemical and Atomic Workers International Union.

VI.

Plaintiff was selected by Defendant Texaco to participate in a carpenter training program. The company had an established past practice, based on

written agreements between the union local and the company, of awarding employees who successfully completed the training program classification seniority dating back to the beginning of the program, to-wit:

(a) On August 18, 1971, Defendant Texaco entered into an agreement with Local 1792 indicating that the apprentice trainees in that program would have classification seniority dating back to the onset of the program.

(b) On December 20, 1976, Defendant Texaco entered into an agreement with Local 1792 indicating that the apprentice trainees in that program would have classification seniority dating back to the onset of the program.

(c) On May 12, 1978, Defendant Texaco entered into an agreement with Local 1792 indicating that the apprentice trainees in

that program would have classification seniority dating back to the onset of the program.

(d) On May 18, 1982, Defendant Texaco entered into an agreement with Pipefitters Local Union No. 195 indicating that the apprentice trainees in that program would have classification seniority dating back to the onset of the program.

VII.

On August 18, 1980, Plaintiff entered a craft training program as a carpenter trainee in the apprentice classification. Plaintiff, upon joining the craft, became represented by Local 1792. Plaintiff successfully completed the training program, within 30 months, and was promoted to the carpenter classification on February 18, 1983. Plaintiff worked in this position until he was reduced to the

Labor Pool and then laid off on April 3, 1983.

VIII.

While the Plaintiff was still in the craft training program, Defendant Texaco hired a white journeyman carpenter, R. L. Simon, and permanently assigned him directly into the carpenter classification. Mr. Simon's carpenter classification seniority date is October 26, 1981.

IX.

On February 1, 1983, Defendant Texaco gave Local 1792 notice of its intent to lay off approximately fourteen (14) employees from the bargaining unit after a sixty-day period required by the Labor Agreement. This layoff was governed by the seniority provisions contained in the Labor Agreement.

Under this Agreement, reductions from the various craft classifications are made in inverse order of classification seniority with the exception of black employees hired before June 21, 1963, of which class Plaintiff is not a member. An employee reduced from a classification may claim any other job to which he/she is entitled by classification seniority within a section. Persons reduced from classifications and unable to claim other classified jobs are placed in the Labor Pool. Employees in the Labor Pool are laid off in inverse order of plant seniority.

Under the provisions of the Labor agreement, classification seniority commences on the date an employee is permanently assigned to a classification, provided such assignment extends beyond

120 days. Plant seniority is defined as seniority in the bargaining unit.

X.

Retroactive seniority in the craft classification had been granted for time spent in the training program by virtue of individual agreements separately negotiated in the past between Defendant Texaco and union locals. In September 1980, Local 1792 originally proposed granting retroactive seniority to the four trainees it represented in the 1980 training program (three whites and Plaintiff). At that time, Defendant Texaco proposed that the trainees must complete the program within thirty (30) months in order to receive retroactive seniority. The Union refused to agree to this restriction, which had never been included in any of the four previous agreements, and, after several

discussions, the last of which occurred in January, 1981, the issue was dropped.

On March 7, 1982, a new Labor Agreement was signed which continued the previous seniority provisions. But, the Agreement had no provision for trainees to obtain craft classification seniority while working as a trainee; although, the only provision which the Union and Defendant Texaco failed to agree upon was whether to grant retroactive seniority to those trainees who did not complete the training program within 30 months.

By a letter dated February 8, 1983, Local 1792 again proposed that retroactive craft classification seniority be given to the craft trainees who had started their training program in August 1980. At that time, there were only two employees represented by Local 1792 in the training program, Plaintiff and a white boilermaker

trainee. Local 1792's request was discussed by Labor Relations Supervisor D. C. Wilson, Personnel Manager D. E. Watson, Staff Attorney D. R. Sheil and Employee Relations Manager R. Girouard. Mr. Sheil advised against making any change in seniority at that time in view of the prior bargaining impasse over the issue and the impending layoff.

XI.

On February 1, 1983, Defendant Texaco gave the Union notice of its intent to lay-off approximately fourteen (14) employees from the bargaining unit.

Shortly thereafter, Plaintiff became informed, by way of rumors, that his seniority may not include the time he had spent in the training program. In an effort to protect his job, Plaintiff immediately questioned representatives of Defendant Texaco concerning the matter.

The representatives assured Plaintiff that he would receive retroactive seniority. Later Defendant Texaco informed Plaintiff that it did not intend to grant him retroactive seniority, although all previous trainees had been granted retroactive seniority upon successful completion of the program.

Upon Plaintiff's completion of the carpenter training program, Defendant refused to award Plaintiff classification seniority dating from the beginning of the training program (August 18, 1980) but instead computed seniority with respect to Plaintiff from the date Plaintiff completed the program (February 18, 1983).

XII.

Plaintiff repeatedly requested that Defendant Texaco award him retroactive seniority for the time he had spent in the training program, as was done for former

trainees. However, Defendant Texaco ignored Plaintiff's demands and refused to award him retroactive seniority. As a result of the reduction in force, on or about April 1983, plaintiff was laid-off while R. L. Simon, a white employee who was hired as a carpenter on October 28, 1981, while Plaintiff was in the training program, was not laid-off.

XIII.

Defendant Texaco's refusal to award the trainees retroactive seniority had a direct effect on Plaintiff, the only black in the apprentice training program, because the white trainees had been with the company longer than Plaintiff and did not need the retroactive seniority for time spent in the program to secure their jobs.

XIV.

Thereafter, Plaintiff filed a written charge of discrimination, under oath, with the Equal Employment Opportunity Commission alleging that he was not given classification seniority as a carpenter and was laid off because of his race. On or about August 22, 1983, Plaintiff, Bobby N. Owens, received his Notice of Right to Sue from the Equal Employment Opportunity Commission.

****

CONCLUSIONS OF LAW

I.

The Court has jurisdiction over the subject matter and parties to the suit.

II.

The Plaintiff has the burden of proving a prima facie case of discrimination because of race in violation of Title VII of the Civil Rights Act of 1964. To do this, Plaintiff must

show "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.'" Furnco Construction Corp. v. Waters, 438 U.S. 567, 576 (1978), quoting International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 (1977). See also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

III.

The Plaintiff may carry the burden of persuasion by establishing a prima facie case of racial discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, supra. Establishment of a prima facie case in effect creates a presumption that the employer unlawfully discriminated against

the employee. The Defendant can rebut the presumption by producing evidence that its employment decisions were motivated by legitimate, non-discriminatory reasons. Burdine, 450 U.S. at 254; McDonnell Douglas, supra. In other words, a defendant must produce "a non-discriminatory explanation for the apparently discriminatory results." Teamsters, 431 U.S. a 360, n.46.

After the defendant employer meets this requirement, the plaintiff must prove by a preponderance of the evidence that the proffered reason was not the true reason for the employment decision, but was merely a pretext to hide an illegal, discriminatory act. Burdine, 450 U.S. at 256. See also McDonnell Douglas, 411 U.S. at 804. A plaintiff can succeed in doing this directly if he shows "...that a discriminatory reason more likely

motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, supra.

IV.

Discriminatory treatment under 42 U.S.C. § 1981 are measured by the same standards that apply to discriminatory treatment claims under Title VII. Rivera v. City of Wichita Falls, 665 F.2d 531, 534 n.4 (5th Cir. 1982). See also McWilliams v. Escambia County School Board, 658 F.2d 326, 331 (5th Cir. 1981).

V.

Several witnesses, including representative of Defendant Texaco, testified that there was an established past practice of awarding employees who successfully completed the training program classification seniority dating back to the onset of the program. The

witnesses also stated that Defendant Texaco and Local 1792 had agreed to grant the trainees in Plaintiff's program, who successfully completed the program, retroactive seniority dating back to the onset of the program. Plaintiff justifiably felt that he would receive seniority which dated back to the onset of the training program when he successfully completed it.

VI.

Defendant Texaco wanted to include in the Labor Agreement a new and unprecedented restriction that trainees complete the apprentice training program within thirty (30) months, but because of the added restriction, the Union refused to ratify the Labor Agreement. However, on March 7, 1982, some nineteen months after Plaintiff began the training program, a new Labor Agreement was signed

which failed to include any provision for retroactive seniority. When Local 1792 approached Defendant Texaco in February 1983, about giving retroactive craft classification to the trainees, the company refused due to the impending layoff. The result was that Plaintiff was laid off and R. L. Simon was not.

VII.

In the instant case, Plaintiff established a prima facie case of race discrimination with regard to the defendant's failure to award him retroactive seniority. He did so by establishing the following: (1) he belonged to a minority group, (2) he successfully completed the training program, within thirty months, and was qualified for and entitled to retroactive seniority for time spent in the program, (3) that he was rejected or denied

retroactive seniority despite his qualifications, and (4) the denial of retroactive seniority was done so that R. L. Simon, a white employee, would be retained. See McDonnell Douglas, supra.

VIII.

The Defendant Texaco's refusal to follow its past pattern and practice of awarding trainees retroactive seniority classification caused Plaintiff, a black employee, to be treated different from prior white trainees. In short, Plaintiff was denied an employment benefit which had previously been granted to white employees. Defendant Texaco's actions were obviously discriminatory and such conduct on the part of Defendant Texaco constituted a prima facie case of racial discrimination.

IX.

To rebut the Plaintiff's prima facie case, Defendant Texaco stated that in denying the Union's February 1983 proposal they relied on the advice of counsel who decided, based on the impending layoff and the bargaining impasse, and advised the company against making any changes in seniority. Then, upon Plaintiff's completion of the training program, Defendant Texaco denied him retroactive seniority. By denying Plaintiff seniority, Defendant Texaco permitted R. L. Simon, a white employee hired after Plaintiff, to retain his job, thus denying Plaintiff that which was rightfully his. It is obvious that defendant Texaco's subjective reasons for denying Plaintiff retroactive seniority were more likely than not based on a discriminatory criterion illegal under the Act and were a mere pretext to

cover up their discriminatory actions against Plaintiff because of his race.

X.

Defendant Texaco's seniority system, a system which was negotiated by the Company and the Union, has been in existence for more than twenty years. This seniority system was included in the Labor Agreement and was in effect in 1983. This system applied to Plaintiff was discriminatory.

XI.

It is the purpose of Title VII "...to make persons whole for injuries suffered on account of unlawful employment discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). Thus, plaintiff is entitled to a declaratory judgment against the Defendant Texaco as a consequence of their unlawful employment practices which violates Title VII of the

Civil Rights Act of 1964, as amended, and 42 U.S.C. § 1981.

XII.

Plaintiff, Bobby N. Owens, is therefore entitled to relief, including back pay, reinstatement, actual and compensatory damages, interest from the date of judgment, attorneys' fees and costs.

IT IS SO ORDERED.

SIGNED AND ENTERED this the 1st day of July, 1985.

(Sgd.) Joe J. Fisher

United States District Judge

BOBBY N. OWENS,

Plaintiff-Appellee,

v.

TEXACO,INC., AND THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS AND THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1792,

Defendants,

TEXACO, INC.,

Defendant-Appellant

No. 86-2551

United States Court Of Appeals
Fifth Circuit

Oct. 14, 1988

Appeal from the United States District Court from the Eastern District of Texas

Before CLARK, Chief Judge, GARZA and POLITZ, Circuit Judges.

CLARK, Chief Judge:

This appeal arises from the judgment of the district court that the seniority system which Texaco, Inc. applied to Bobby

Owens violated Title VII of the Civil Rights Act of 1964, as amended, and 42 U.S.C. §1981. Because the district court's findings of fact are clearly erroneous, we reverse.

Facts

Bobby N. Owens was laid off by Texaco, Inc. on April 4, 1983, pursuant to the terms of a collective bargaining agreement between Texaco and the International Association of Machinists, Local 1792 (IAM). At that time Owens had the least seniority of any employee in his classification (carpenter), as calculated by the method prescribed in the master labor agreement. That agreement provided that seniority be calculated from the day the employee entered his classification. Owens argued that he was entitled to retroactive seniority for time he had spent in a craft training program, since

such training program time had been counted for seniority in the past.

Owens' argument refers to previous occasions when retroactive seniority had been awarded pursuant to separate, negotiated agreements between Texaco and some of the unions representing workers at Texaco's Neches chemical plant. No such agreement had been made between Texaco and Owens' union, the IAM, which covered Owens' training class. Because no specific agreement for retroactive seniority existed for Owens, Texaco refused to give him credit for his time in the training program. As a result, R.L. Simon, who was hired as a journeyman carpenter after Owens entered the training program but before Owens completed it, had more seniority under the collective bargaining agreement. When Owens was laid off, Simon

was retained. Owens is black; Simon is white.

Background

Prior to 1980, three training classes were conducted at Texaco's Neches chemical plant. For each of these three classes, the IAM, which represented carpenters, machinists, and boilermakers, negotiated a separate contract with Texaco to give retroactive seniority dating back to entry in the program to trainees who completed the class. The Pipefitters Union had a similar separate training class contract for the labor classifications it represented. These contracts specifically altered the seniority system set out in the collective bargaining agreements. One union, the International Brotherhood of Electrical Workers, never had such a contract for its member-trainees.

When the 1980 training class, of which Owens was a member, started, the IAM again proposed an agreement for retroactive seniority. Texaco made a counterproposal which required that trainees complete the program within 30 months in order to receive retroactive seniority. The IAM would not agree, and no contract concerning retroactive seniority for trainees in this class was entered. After the layoffs were announced in 1983, union officials again proposed a seniority agreement for trainees from the 1980 class. On advice of counsel, Texaco refused to contract for a change in the seniority procedure at a time when layoffs were impending.

IAM filed a grievance on behalf of the trainees alleging that Texaco had violated the collective bargaining agreement by not granting them retroactive

seniority. The dispute was submitted to arbitration. The arbitrator specifically determined that Owens had no contractual right to retroactive seniority. He also found no evidence of racial discrimination.

Owens then filed a charge with the Equal Employment Opportunity Commission. The Commission found no probable cause to believe that Owens had been subject to discrimination and issued a right to sue letter. This action ensued.

Under the evidentiary guidelines distilled by the Supreme Court, a plaintiff can make out a prima facie case of a Title VII violation by establishing: 1) that he belongs to a racial minority; 2) that he was qualified for a particular position; 3) that he was not hired or retained despite his qualifications; and 4) that he was replaced by a nonminority.

See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253, 202 S.Ct. 1089, 1094, 67 L.Ed.2d 207, 215 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668, 677 (1973). The district court determined that Owens had proved a prima facie case of racial discrimination since the evidence showed; 1) that he was qualified for and entitled to retroactive seniority because he had completed the training program within 30 months, 2) that he was denied seniority despite his qualifications; and 3) that this was done so that a white employee would be retained. The court further found 1) that Texaco had an "established past practice" of awarding retroactive seniority to participants in training programs; 2) that Texaco's conduct in refusing to follow that past practice was "obviously

discriminatory," and 3) that Texaco's reasons for this action were more likely than not based on discriminatory criteria. The district court made no mention of the arbitrator's interpretation of the collective bargaining agreement.

These findings of the district court are contrary to the evidence and clearly erroneous. The court also erred in completely disregarding the arbitral decision.

Owens' Right to Retroactive Seniority

The district court's finding that Owens was entitled to retroactive seniority ignored the arbitrator's earlier interpretation of the collective bargaining agreement and subsequent negotiations between Texaco and the IAM. After a full hearing on the issue, the arbitrator concluded that:

> Indeed, the evidence indicates that there was much

> negotiation between the company and the union in this matter and an agreement never was reached since both sides were not satisfied with the conditions. There would be no reason for those protracted negotiations if an agreement was in force or if past practice dictated the course of action to be taken. If I were to rule in the Union's favor, I would be granting to the Union something that the company specifically disagreed to in negotiations. This certainty would do violence to the collective bargaining process.

The district court erred in completely disregarding the arbitration award.

An employee may pursue fully both his right to arbitration under a collective bargaining agreement and his cause of action under Title VII, and the findings of the arbitrator with regard to discrimination issues are not binding on the court. Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). However, under the Steelworkers

Trilogy,[1] the arbitral decision is final and binding to the extent it resolves questions of contractual rights. The employee may assert his independent statutory rights under Title VII, but the arbitrator's interpretation of the contract status of the parties is controlling. In this instance the arbitrator specifically addressed the question of Owens' right to retroactive seniority under the collective bargaining agreement and determined that he had none. He further found that the company and the union had been unable to agree on the terms of a modifying contract and that past practice did not control retroactive

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[1] United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

seniority. The district court was bound by the arbitrator's interpretation of the bargaining agreements and status of the parties. No new or different evidence was presented at trial to support Owens' right to retroactive seniority. The court was clearly erroneous in concluding that Owens was entitled to retroactive seniority.

Past Pattern or Practice

The district court, in its Findings of Fact and Conclusions of Law, referred several times to Texaco's "past practice" of granting retroactive seniority to trainees. The court was correct in observing that three previous training classes were awarded seniority dating back to their entry in the program upon completion of their training. However, this was contrary to seniority provisions in the Master Labor Agreement and was based upon modifications agreed to in

separately negotiated agreements between the individual unions and Texaco. Nothing in the record indicates that retroactive seniority was ever given to any trainee in the absence of a contract to that effect. The fact that specific negotiations culminating in a contract modification took place for each of the previous classes lends great weight to Texaco's contention that no past pattern of granting seniority without a contract ever existed. For example, we note the IBEW never negotiated such an agreement and trainees represented by that union were never given retroactive seniority.

At the time Owens' class began training, Texaco and IAM had been unable to reach agreement regarding credit for time in the training program. Therefore, the collective bargaining agreement controlled seniority, and its provisions

did not include any provision for retroactive seniority. The district court found as a fact that the layoff was governed by those provisions. The evidence is clear that Texaco had no retroactive seniority policy outside the separate, negotiated contracts. The district court's finding that Owens was entitled to such seniority is clearly erroneous.

Texaco's Reasons for Refusing Retroactive Seniority

The arbitrator's resolution of the contractual claim is not dispositive of Owens' statutory claims under Title VII. A critical fact in this case was whether Texaco's decision not to change the seniority agreement after the layoff was announced was based on discriminatory criteria. When the IAM approached Texaco in 1983 and offered to agree to Texaco's request to limit training course

seniority to those completed in 30 months, Texaco consulted its house counsel, Sheil. Sheil advised Texaco that although the company had the right to agree to the proposal at that juncture, he recommended against it. In his opinion, changing the seniority list after a layoff had been announced would create a greater risk of ultimate liability than not changing it.

Sheil testified that when he gave that advice, he was unaware of the status of any particular employees who would be affected or of any such employees. Likewise, Girouard, the Texaco official who made the final decision with regard to the union proposal, and other Texaco representatives with whom he discussed the issue, testified that they made no investigation into which individual would

be affected nor did they look at the existing seniority list.

Texaco management relied on Sheil's advice in rejecting the union's proposal for retroactive seniority. The district court, however, discounted this advice as the reason for Texaco's action. Obviously the court disagreed with it.

Owens contends that he had actually completed the training program within 30 months, and that this complied with Texaco's original proposal to modify the seniority provisions of the underlying collective bargaining agreement. Therefore, he contends, Texaco should have given him retroactive seniority, and that they did not do so in order to keep Simon, the white employee, on the job. This completely ignores the fact that seniority rules were in place under the collective bargaining agreement and that

no separate contract to change those rules had been made. Whether an employee finished a training course in 30 months was irrelevant under the seniority system provided in the governing collective bargaining agreement. Sheil's advice was sound, but even if it had not been so, there is no evidence in the record that Texaco's reliance on it was unreasonable or merely a pretext to cover a racial motive.

The arbitrator found no evidence of racial discrimination in Owens' case. Under Gardner-Denver, a court may accord the arbitral decision on discrimination issues such weight as it considers appropriate under the facts and circumstances of the case before it. Gardner-Denver, 415 U.S. at 60 n. 21, 94 S.Ct. at 1025 n. 21, 39 L.Ed.2d at 165 n. 21. Although the arbitrator's decision was not

controlling, it can properly be considered in this case. His findings reinforce the conclusion that Sheils' advice was based on a correct perception of the company's position regarding existing seniority rights. The district court was not warranted in wholly ignoring the arbitral decision that no racial discrimination existed. The district court's conclusion that Texaco's reasons for refusing to agree to retroactive seniority were not legitimate is clearly erroneous.

The district court's conclusion that Texaco's actions were "obviously discriminatory" is not supported by the evidence. The actions to which the court refers is the refusal to follow its past pattern and practice of awarding trainees retroactive seniority. The undisputed evidence that the past practices of Texaco and the

unions in negotiating and making collateral agreements regarding retroactive seniority varied from class-to-class and union-to-union makes it clear there was no set pattern with regard to making such seniority modifications.

Conclusion

The judgment of the district court is reversed and the case is remanded with directions to enter judgment for Texaco.

REVERSED and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2551

BOBBY N. OWENS,

Plaintiff-Appellee,

versus

TEXACO INC., AND THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS AND THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1792,

Defendants,

TEXACO, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 14, 1988, 5 Cir., 198_, ____ F.2d ____)

(December 6, 1988)

Before CLARK, Chief Judge, GARZA and POLITZ, Circuit Judges.

PER CURIAM;

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the

reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

(Sgd.) Charles Clark
CHIEF JUDGE